**HASNAH CHE HASAN** A

**v.**

**HONGKONG BANK MALAYSIA BHD**

HIGH COURT MALAYA, KUANTAN B
VT SINGHAM J
[BANKRUPTCY NO: 29-413-1994]
28 DECEMBER 2009

***BANKRUPTCY:*** *Adjudication and receiving orders - Setting aside - Whether proper service of bankruptcy notice and creditor's petition - Whether alteration to documents filed in court admissible - Whether miscalculation of interest raised by judgment debtor rebutted* C

In this appeal by the judgment debtor ('JD') against the Deputy Registrar's decision dismissing her application to rescind and annul the Receiving and Adjudication Orders ('RO and AO') made against her, the issues, *inter alia*, were: (1) that the bankruptcy notice ('BN') and the creditor's petition ('CP') were not served at the JD's correct address; (2) the documents filed in court were tampered with; (3) the calculation of interest in the BN was inaccurate; and (4) the person purportedly authorised to act on behalf of the judgment creditor ('JC') had no such authority. The JC raised an objection that the JD had no *locus standi* to set aside the RO and AO (that were apparently given in the JD's absence in the bankruptcy proceedings) without the previous sanction of the Official Assignee under s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). D E F

**Held (allowing JD's appeal):** G

**(1)** Under s. 105(1) of the Act, the jurisdiction to annul and rescind the RO and AO were discretionary and the actual state of affairs at the date of the orders had to be considered. (paras 6 & 7)

**(2)** The sanction referred to in s. 38(1)(a) of the Act did not apply to a bankrupt who sought the court's discretion to set aside the RO and AO or any other orders made by the court against him in the bankruptcy proceedings. (para 8) H I

**(3)** The facts showed that the BN and CP were not posted on the correct premises of the JD and that the CP was not served by way of substituted service as ordered by the court. There was also no evidence to show that the JD was informed of any adjournment or of the actual date of hearing of the CP when the RO and AO were made against her. (paras 13 & 19)

**(4)** The affidavit of the process server did not state who had directed him to serve the BN and in what capacity he had served it. Although that was not a decisive consideration for determining service, it was a relevant factor to be taken into consideration since the service of the BN was challenged by the JD. Further, r. 109 of the Rules provided that the CP shall be served by specified persons. The JC also did not comply with rr. 110 and 111(1) of the Rules. As such, the deeming provision in sub (2) of r. 110 could not be activated. (paras 20, 21 & 22)

**(5)** The RO and AO stated that the JD was present in court when the CP was called for hearing whilst the handwritten copy of the notes recorded by the Deputy Registrar stated that the JD was not present. The JC blamed its previous solicitors to have inadvertently stated that the JD was present. The presence of the JD had a strong bearing on the determination of whether the BN was in fact posted at the JD's correct premises and on the subsequent creditor's petition purported to have been posted by way of substituted service. (para 25)

**(6)** The JC did not show any rebuttable evidence that the alterations in the BN and affidavit thereto were done before the filing thereof. The alterations were also not initialled by the deponent or the Commissioner of Oaths. The reasonable inference was that the alterations were done after the affidavit was affirmed and the BN signed by the Deputy Registrar. Such alterations or tampering of evidence was inadmissible and rendered the BN bad in law and defective unless prior leave of the court was obtained. The alterations were not formal defects which could be allowed to be used as evidence as r. 39 of the Rules was crystal clear that the requirements therein were mandatory. Also, r. 41 of the same did not apply as the defects were not of a formal, a mere irregularity or a trivial nature. (paras 29 & 30)

**(7)** There was no evidence to show that the deponent of the relevant affidavit had the legal authority to commence the bankruptcy proceedings on behalf of the JC. No explanation or rebuttable evidence was given nor was there a copy of the power of attorney to show such authority. (para 36)

**(8)** As there was no explanation or rebuttable evidence to the glaring difference in the calculation of the interest, the JC was deemed to have accepted the JD's contention that there was a miscalculation in the interest and that the interest claimed in the BN was more than the amount due. The BN was therefore a nullity. (para 38)

**(9)** The period of delay had to be considered or assessed from the date the JD knew or ought to have known of the RO and AO made against her. The JD only came to know of the orders when she was informed by a financial institution that she was not qualified to obtain a loan to purchase a vehicle. She then appointed solicitors to obtain the details of the bankruptcy proceedings and thereafter managed to obtain all the relevant documents from the insolvency department. (para 40)

**(10)** It was not fair and equitable that the JD should have been adjudged a bankrupt based on the cumulative effect of the defects found. The JD advanced sufficient reasons in support of her application to rescind and annul the RO and AO under s. 105 of the Act. The defects were serious and could not be remedied by invoking s. 131 of the Act or r. 274 of the Rules. (paras 44 & 45)

**Case(s) referred to:**

*Affin Bank Bhd v. Major Galaxy Sdn Bhd & Ors [2006] 5 CLJ 73 HC* ***(refd)***

*Affin Bank Bhd v. Tan Sri Kishu Tirathai [2008] 2 CLJ 448 CA* ***(refd)***

*Algemene Bank Nederland NV v. Loo Choon Yow [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846 HC* ***(refd)***

*Atwood v. Chichester [1978] 3 QBD 722* ***(refd)***

*Azrin M Kamaluddin; Ex P Standard Chartered Bank Malaysia Bhd [2007] 5 CLJ 132 HC* ***(refd)***

*Beale v. Mc Gregor [1886] 2 TLR 311* ***(refd)***

*Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC* ***(foll)***

*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***

*Chen Heng Ping v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690 CA* ***(refd)***

A *Chong Peng Chong v. Chin Lean Fatt & Ors [2004] 1 CLJ 22 HC* ***(refd)***
*Craig v. Kanssen [1943] 1 All ER 108* ***(refd)***
*CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals [2002] 2 CLJ 1 FC* ***(refd)***
*Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690 CA* ***(refd)***
B *Chong Chin Shoong v. Development & Commercial Bank Bhd [1989] 1 LNS 121 HC* ***(refd)***
*Dato' Haji Mohd Muslim Othman v. Shuaib Lazim & Anor [1993] 1 AMR 319* ***(refd)***
*Datuk Mohd Safi Datuk Haji Nur v. Norwith Winster Slow Insurance (M)*
C *Sdn Bhd [1992] 2 MLJ 344* ***(refd)***
*Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC* ***(refd)***
*Evans v. Bartlam [1937] AC 473* ***(refd)***
*Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors [2003] 3 CLJ 39 HC* ***(refd)***
D *George Paul Daniel Arokiam, Berkenaan: Ex P; United Asian Bank Bhd [1990] 2 CLJ 750; [1990] 1 CLJ (Rep) 364 HC* ***(foll)***
*Haliza Suradei & Ors v. Ng Eng Lee [2001] 1 CLJ 266 HC* ***(refd)***
*Hamidah Abd Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd [1990] 1 LNS 45 CA* ***(refd)***
E *In Re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd [2001] 8 CLJ 226 HC* ***(refd)***
*J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA* ***(refd)***
*Koh Thong Kuang v. United Malayan Banking Corporation Berhad [1994] 4 CLJ 488 SC* ***(refd)***
F *Kwong Yik Bank Bhd v. Hah Chiew Yin [1985] 2 CLJ 31; [1985] CLJ (Rep) 178 FC* ***(refd)***
*Lim Boon Peng v. United Orient Leasing Co Bhd [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270 SC* ***(refd)***
*Malayan Banking Bhd v. PK Rajamani & Anor [2004] 3 CLJ 79 CA* ***(refd)***
G *MUI Bank Bhd v. Datuk Syed Kechik Syed Mohamed [1993] 1 LNS 306 HC* ***(refd)***
*Muniandy Thamba Kaudan & Anor v. Development & Commercial Bank Bhd [1996] 2 CLJ 586 FC* ***(foll)***
*Ng Hee Thoong & Anor v. Public Bank Berhad [1995 1 CLJ 609 CA* ***(foll)***
*Peh Kong Wan, Re [1992] 3 CLJ 1747; [1992] 3 CLJ (Rep) 195 HC* ***(foll)***
H *Pg Ahmad Pg Hj Abdullah, Re: Ex P; Oriental Bank Bhd [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463 HC* ***(refd)***
*Re A Debtor (No. 12 of 1970) ex p Official Receiver v. The Debtor [1971] 1 All ER 504* ***(foll)***
*Re A Debtor (No 446 of 1918) [1920] 1 KB 461* ***(foll)***
I *Re Amos William Dawe; Amos William Dawe v. Wayfoong Mortgage And Finance (Singapore) Ltd [1978] 1 LNS 167 CA* ***(foll)***
*Re Amran Ahmad, ex p MBF Finance Bhd [2005] 7 CLJ 172 HC* ***(refd)***

*Re Application of Asia Insurance Co Ltd v. Tan Swee Liang [1967] 1 LNS 138 HC* ***(refd)***
*Re Carr [1886] 35 WR 150* ***(refd)***
*Re Chen Sing Chew; ex parte Oriental Tin Smelters Sdn Bhd [1974] 1 LNS 131 HC* ***(refd)***
*Re Cheong Sooi Loong [1992] 4 CLJ 2063; [1992] 2 CLJ (Rep) 237 HC* ***(refd)***
*Re David ex p United Asian Bank Bhd [1991] 2 CLJ 1047; [1991] 2 CLJ (Rep) 543* ***(foll)***
*Re Davidson [1894] WN 210* ***(refd)***
*Re Francis Philips AJ Philips; Ex P Bank Perusahaan Kecil & Sederhana Malaysia Bhd [2008] 1 LNS 159 HC* ***(refd)***
*Re Ho Fok, ex p Ann Bee (M) Sdn Bhd [2002] 2 CLJ 223 HC* ***(refd)***
*Re Khoo Kim Hock [1974] 1 LNS 134 HC* ***(foll)***
*Re Lim Chooi Sang ex p Soon Fay Sdn Bhd [1999] 5 CLJ 605 HC* ***(refd)***
*Re Lim Tai Nian, ex p Kewangan Utama Bhd [2002] 1 CLJ 41 HC* ***(refd)***
*Re Peter Wong; Ex Parte The Debtor [1958] 1 LNS 66 HC* ***(refd)***
*Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1989] 1 LNS 165 HC* ***(refd)***
*Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim [2000] 2 CLJ 535 HC* ***(refd)***
*Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim (No 2) [2000] 6 CLJ 364 HC* ***(refd)***
*Re Stephen Wong Leong Kiong, ex p HSBC Bank Malaysia Bhd [2005] 5 CLJ 504 HC* ***(dist)***
*Re Yeap Chee Fun, ex p Pernas Trading Sdn Bhd [2000] 5 CLJ 280 HC* ***(refd)***
*Re Yong Tet On, Paul, Ex Parte Chung Khiaw Bank Ltd [1996] 1 CLJ 836 HC* ***(refd)***
*Sama Credit and Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia [1995] 2 CLJ 368 SC* ***(refd)***
*Shuaib Lazim, Re: Ex P; Mercantile Insurance Sdn Bhd [1992] 3 CLJ 580 HC* ***(refd)***
*Supreme Finance (M) Bhd v. Mohamad Noor Yusuf & Ors [1993] 1 LNS 158 HC* ***(foll)***
*The Motor Emporium v. Arumugam [1933] 1 LNS 106 HC* ***(refd)***
*Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad [1996] 1 CLJ 241 FC* ***(refd)***
*UMW Industries (1985) Sdn Bhd v. Lim Chee Hian [2005] 1 CLJ 173 CA* ***(refd)***
*United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd [1988] 1 CLJ 577; [1988] 2 CLJ (Rep) 522 HC* ***(refd)***
*United Oriental Assurance Sdn Bhd v. Ng King See [1986] 1 LNS 87 HC* ***(foll)***
*V David, Re: Ex P; United Asian Bank Bhd [1991] 2 CLJ 1047; [1991] 2 CLJ (Rep) 543 HC* ***(foll)***
*Yew Leek Enterprise Sdn Bhd v. Foong Engineering & Construction Works Sdn Bhd [1989] 1 LNS 141 HC* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, ss. 38(1)(a), 105(1), (5), 131
Bankruptcy Rules 1969, rr. 39, 41, 109, 110, 111(1), 114(2), 115, 274, 276
Rules of the High Court 1980, O. 41

*For the appellant - Dato' Bastian Vendargon (R Sarengapani with him); M/s Vendargon & Partners*
*For the respondent - Wai Lai Fong; M/s Shearn Delamore & Co*

*Reported by Usha Thiagarajah*

## JUDGMENT

**VT Singham J:**

**[1]** This is an appeal to the judge in chambers (encl. 42) by the appellant/judgment debtor (JD) against the decision of the learned Deputy Registrar dated 16 June 2008 (encl. 58). The learned Deputy Registrar had dismissed with costs the JD's application by way of summons in chambers dated 11 January 2007 (encl. 21) to annul the Receiving Order and Adjudicating Order given on 21 November 1995. The JD who is dissatisfied with the decision of the learned Deputy Registrar had filed this notice of appeal to the judge in chambers dated 17 June 2008 (encl. 42). An appeal to the judge in chambers, the jurisdiction to review, rescind or vary any order made by the registrar under the bankruptcy proceedings is a rehearing.

**[2]** The grounds raised by the JD before the learned Deputy Registrar in support of the application to annul the receiving order and the Adjudicating Order given on 21 November 1995 by way of summons in chambers (encl. 21) are briefly as follows:

(i) The bankruptcy notice and creditor's petition were not served on the judgment debtor at the correct address.

(ii) The cause papers have been tampered with.

(iii) The calculation of the sums claimed was not in accordance with the terms of the consent judgment.

(iv) The request for the issuance of the bankruptcy notice was invalid.

**[3]** The submissions of learned lead counsel on behalf of the JD in this appeal is that, the learned Deputy Registrar had not exercised her discretion judicially in dismissing the said application (encl. 21). By written submission (encl. 53), it has been submitted on behalf of the JD, which briefly, is as follows:

(i) The bankruptcy proceedings (BN and CP) were not served at the correct address.

(ii) The documents filed in court (encl. 4 & encl. 2 and the affidavit of Idris bin Ismail affirmed on 7 September 1994) had been tampered with and cannot be accepted by the court.

(iii) The calculation of the interest is inaccurate and not in accordance with the terms of the consent judgment.

(iv) Learned counsel on behalf of the respondent/JC through Idris bin Ismail had no authority to act in enabling the JC to commence bankruptcy proceedings.

(v) Sufficient reasons had been given by the JD in filing the application at this stage.

**[4]** The submissions of the respondent/judgment creditor (JC) as contained in the written submission (encl. 55) is briefly as follows:

(i) The JD was unable to satisfy the judgment debt and the receiving order and adjudicating order was rightly made.

(ii) **Service** of the bankruptcy notice and **the creditor's petition is regular** (emphasis by the court).

(iii) **Amendment to the bankruptcy notice and affidavit are regular** (emphasis by the court).

(iv) The JD's calculation of the amount and interest in the bankruptcy notice was prepared purely in support of the application to annul the adjudicating order and receiving order and is therefore a self-serving statement and ought to be disregarded.

Learned counsel for the JD had referred to the following cases:

1. *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241

A 2. *Chong Chin Shoong v. Development & Commercial Bank Berhad* [1989] 1 LNS 121

3. *Re Sebastian, exp Metroplex Leasing & Credit Corp Sdn. Bhd.* [1989] 1 LNS 165

B 4. *Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors* [2003] 3 CLJ 39

5. *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690

C 6. *J. Raju M. Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104

7. *UMW Industries (1985) Sdn Bhd v. Lim Chee Hian* [2005] 1 CLJ 173

D 8. *Re Lim Chooi Sang exp Soon Fay Sdn Bhd* [1999] 5 CLJ 605

9. *Re Khoo Kim Hock* [1974] 1 LNS 134

E 10. *Re Cheong Sooi Loong* [1992] 4 CLJ 2063; [1992] 2 CLJ (Rep) 237

11. *CGU Insurance Bhd v. Asean Security Paper Mills Sdn. Bhd. & Other Appeals* [2002] 2 CLJ 1

F 12. *Re Lim Tai Nian; ex p Kewangan Utama Bhd* [2002] 1 CLJ 41

Learned counsel for the JC had referred to the following cases:

1. *Bungsar Hill Holdings Sdn. Bhd. v. Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809

G 2. *Re Stephen Wong Leong Kiong, ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504

3. *Algemene Bank Nederland N.V v. Loo Choon Yow* [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846

H 4. *Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim* [2000] 2 CLJ 535

5. *Re Amran Ahmad, ex p MBF Finance Berhad* [2005] 7 CLJ 172

I 6. *Re Yeap Chee Fun, ex p Pernas Trading Sdn Bhd* [2000] 5 CLJ 280

7. *Koh Thong Kuang v. United Malayan Banking Corp Bhd* [1994] 4 CLJ 488

8. *Affin Bank Bhd. v. Major Galaxy Sdn Bhd & Ors* [2006] 5 CLJ 73

9. *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544

10. *MUI Bank Berhad v. Datuk Syed Kechik bin Syed Mohamed* [1993] 1 LNS 306

11. *Lim Boon Peng v. United Orient Leasing Co. Bhd* [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270

12. *In Re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd* [2001] 8 CLJ 226 HC

13. *Re Ho Fok, ex p Ann Bee (M) Sdn Bhd* [2002] 2 CLJ 223

14. *Azrin M Kamaluddin; Ex P Standard Chartered Bank Malaysia Bhd* [2007] 5 CLJ 132

15. *Re Francis Philips A/J Philips; Ex P Bank Perusahaan Kecil & Sederhana Malaysia Bhd* [2008] 1 LNS 159

16. *Affin Bank Bhd v. Tan Sri Kishu Tirathai* [2008] 2 CLJ 448

17. *Re Chen Sing Chew; ex parte: Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 131

18. *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 3 CLJ 307

19. *Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim (No 2)* [2000] 6 CLJ 364

**[5]** Having read and considered the request for issue of the bankruptcy notice dated 7 September 1994 (encl. 4), bankruptcy notice dated 13 September 1994 (encl. 2), consent judgment dated 14 December 1990 (encl. 3), affidavit affirmed on 7 September 1994 by En. Idris bin Ismail on behalf of the JC, affidavit of non-service of the bankruptcy notice affirmed on 8 December 1994 by En. Mohd. Adzman bin Kasim, the order of court dated 20 December 1994 which had granted the bankruptcy notice to be served by way of substituted service (encl. 6A), creditor's petition dated 21 March 1995 (encl. 10A) together with the affidavit of truth of statement in petition affirmed on 22 February 1995 by En. Idris bin Ismail on behalf of the JC, the affidavit of non-service of the creditor's

petition affirmed on 4 July 1995 by En. Mohd Zaki bin Yusof, the order of court dated 19 July 1995 to serve the creditor's petition by way of substituted service (encl. 12A), notice of hearing dated 19 July 1995 of the creditor's petition (encl. 13A), Affidavit of Service of Advertisement affirmed on 6 September 1995 by En. Gainneous Jacob Goldie in respect of the creditor's petition, the receiving order of creditor's petition dated 21 November 1995 and the order of adjudication dated 21 November 1995, summons in chambers dated 11 January 2007 (encl. 21), affidavit in support of the JD affirmed on 11 January 2007 (encl. 21A), JC's affidavit in reply affirmed on 3 May 2007 (encl. 23), JD's affidavit in reply affirmed on 15 May 2007 (encl. 23A), JC's affidavit in reply affirmed on 12 July 2007 (encl. 28), affidavit of Dato' Bastian Pius Vendargon affirmed on 21 August 2007 (encl. 31), JD's affidavit in reply affirmed on 22 August 2007 (encl. 30), JC's affidavit in reply (3) affirmed on 8 October 2007 (encl. 33), JD's affidavit in reply affirmed on 17 December 2007 (encl. 36), JC's affidavit in reply (4) affirmed on 14 January 2008 (encl. 38), JD's affidavit in reply affirmed on 24 March 2008 (encl. 40), notice of appeal to the judge in chambers dated 17 June 2008 (encl. 42), written and oral submissions together with the bundle of authorities filed by both parties and having closely considered the Bankruptcy Act 1967 and the Bankruptcy Rules 1969, the decision of this court is as follows.

**[6]** In this jurisdiction, the law of bankruptcy is to be found in the Bankruptcy Act 1967 (hereinafter referred to as 'the Act') the Bankruptcy Rules 1969, (hereinafter referred to as 'the Rules'), the Bankruptcy (Costs) Rules 1969 and the Bankruptcy (Fees) Rules 1969 which govern procedure in bankruptcy cases. Bankruptcy proceedings have been held by the courts to be of a quasi penal nature, and so it is imperative that procedural requirements are strictly complied with. (see *Hamidah Abd Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd.* [1990] 1 LNS 45; *Pg Ahmad Pg Hj Abdullah, Re: Ex P; Oriental Bank Bhd* [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463; *Re Stephen Wong Leong Kiong, ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504).

**[7]** Under s. 105(1) of the Act, the jurisdiction to rescind and to annul the receiving and adjudicating orders are discretionary and this court would have to consider the actual state of affairs at the date of the orders. (see *Sama Credit and Leasing Sdn. Bhd. v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 368; [1995] 1 MLJ 274 at p. 279). There are three distinct situations or limbs to consider and make an order of annulment, namely:

(1) where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or

(2) where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or

(3) where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country.

(see *Bungsar Hill Holdings Sdn. Bhd. v. Dr. Amir Farid Datuk Isahak* [2005] 2 CLJ 809). In the instant case, the JD is relying on the first limb.

**Sanction Under s. 38(1)(a) Of The 1967 Act**

**[8]** At the outset of this appeal and before this court proceeds to deliver its decision on the merits of the appeal, it is only proper that this court deals with the legal issue and the objection raised by learned counsel for the JC that the JD has no *locus standi* to apply to set aside the receiving and adjudicating orders given in his absence in this bankruptcy proceedings without the previous sanction of the official assignee (now known as the Director-General of the Insolvency Department) under s. 38(1)(a) of the Bankruptcy Act 1967.

Section 38(1)(a) provides:

(1) Where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency.

This court is of the considered view and which was later, during the course of the submission conceded by learned counsel for the JC that no previous sanction is required for such an application as in the instant case. The sanction referred to in s. 38(1)(a) of the said Act does not apply to a bankrupt who is seeking the court's discretion to set aside the receiving and adjudicating orders or any orders made by the court against him in the bankruptcy proceedings itself. (see *Re Khoo Kim Hock* [1974] 1 LNS 134 and followed in

*Supreme Finance (M) Bhd v. Mohamad Noor & Yusuf & Ors* [1993] 1 LNS 158). (see also *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1989] 1 LNS 165 HC).

**The Bankruptcy Notice And The Creditor's Petition Was Not Posted On The Correct Address Of The JD**

**[9]** This court finds that the complaint of the JD of the non-service of the bankruptcy notice and the creditor's petition is not without any basis as the JD has been able to show that the address of his previous premises was No. 295-A, Jalan Kampung Tengah, Chukai, Kemaman as contained in exh. P1 of the JD's affidavit (encl. 21A). Whereas the posting of the bankruptcy notice and the purported posting of the creditor's petition pursuant to the order of court for substitute service given on 20 December 1994 (encl. 6A) and on 19 July 1995 (encl. 12A) respectively was on premises No. A-295, Jalan Kampung Tengah, Kemaman, Terengganu. The fact that there was an advertisement in "the Star newspaper" does not release the JC from its duty to post both the bankruptcy notice and the creditor's petition on the correct premises of the JD which is No. 295-A, Jalan Kampung Tengah, Chukai, Kemaman.

**[10]** This court also finds from the affidavit of non-service of the bankruptcy notice affirmed by one En. Mohd Adzman bin Kassim on 8 December 1994 states that the deponent had been to premises No. A-295, Jalan Kampung Tengah, Kemaman. The letter to the JD to fix an appointment to serve the bankruptcy notice was also addressed to premises No. A-295, Jalan Kampung Tengah, Kemaman and sent by A.R. registered post. A copy of the A.R. registered card (exh. NA1) attached to the affidavit of non-service shows that the receiver of the same is a construction firm and not the JD. In fact exh. MA2 in the JC's third affidavit (encl. 33) being the approval letter of the overdraft facility from the JC is addressed to a firm Gulam Development and Construction (M) Sdn. Bhd. at K-124, Jalan Kampung Tengah, Kemaman whereas the address of the JD is stated as No. 295-A, Jalan Kampung Tengah, Kemaman and yet the letter addressed to JD at A-295 was received by a construction firm and not the JD. Further, the affidavit of non-service of the creditor's petition affirmed by one En. Mohd. Zaki bin Yusof on 4 July 1995 also states that the deponent went to the premises at No. A-295, Jalan Kampung Tengah, Kemaman to effect service.

In *Re Yeap Chee Fun, ex p Pernas Trading Sdn Bhd* [2000] 5 CLJ 280, the bankruptcy notice was served by way of substituted service in accordance with the order of court. However, the objection of the debtor in that case were based on six grounds where the mode of service was challenged, namely:

i. failure to attempt service on the JD at his last known address;

ii. failure to comply with Practice Note No. 1 of 1968;

iii. breach of r.110(1) of the Bankruptcy Rules 1969;

iv. the mode of substituted service was useless/insufficient/ineffective/irregular/wrong;

v. tainted with misrepresentation of material facts;

vi. no effective service as JD was not aware of the bankruptcy notice.

In that case, and on the set of facts, the court *inter alia* held, namely:

(1) Where an order for substituted service is made the issue is not whether the judgment debtor knows about the bankruptcy notice or not, but whether the order for substituted service was correctly made and the subsequent service was in accordance with the order or not;

(2) The judgment debtor may or may not know about it at the time when the substituted service was made;

(3) No actual knowledge need to be proved;

(4) The fact that the judgment debtor is not aware of the bankruptcy notice, even if it is true, does not nullify service.

In other words, in the case, *Re Yeap Chee Fun* [2000] 5 CLJ 280 referred to by learned counsel for the JC, there was evidence that the bankruptcy notice was in fact served. The JD was aware of the proceeding as the JD had filed the application for an order that the substituted service of the bankruptcy notice be declared null and void about two months after the service by way of SS and the advertisement. Accordingly, the learned registrar dismissed the JD's application to nullify the order for SS of the bankruptcy notice. The JD's appeal to the High Court against the registrar's decision was dismissed.

**[11]** In *Peh Kong Wan, Re* [1992] 3 CLJ 1747; [1992] 3 CLJ (Rep) 195; [1992] 2 MLJ 293 VC George J (as he then was) said at p. 296:

> ... in respect of application for substituted service where it is known or ought to be known that the JD (respondent) has ceased to reside in the last-known address (as was the case in the instant case where the affidavit of non-service states that the JD had shifted), the Registrar should be provided with some evidence as to the probable whereabouts of respondent (JD). The petitioner (JC) should make reasonable inquiries as to the whereabouts of the respondent and if it is suspected that he is out of the jurisdiction, that suspicion should be brought to the attention of the court so the order for substituted service could be formulated to the end that the respondent will in all probability, get to know of the facts of the bankruptcy notice or the presentation of the petition as the case may be. (This case has been referred in *Koh Thong Kuang v. United Malayan Banking Corp. Bhd* [1994] 3 MLJ 509 at p. 513).

**[12]** In *Koh Thong Kuang v. United Malayan Banking Corporation Berhad* [1994] 4 CLJ 488, the Supreme Court held that the learned registrar was perfectly justified in dismissing the JD's application to set aside the bankruptcy notice. In dismissing the appeal against the registrar's decision, the Supreme Court said at pp. 492-493:

> There is evidence that between 1989 and 1993, the JD had entered or he had been in Malaysia on at least 14 different dates. The bank and its solicitors were justified in concluding as they did that the debtor was deliberately evading service and in the face of the various addresses he had given as being his residential addresses were entitled, in directing their mind as to what the last-known address of the debtor was, to decide on the No.146 Jalan Maarof address although it was clear that he was no more residing at that address.
>
> When the application for SS was made, there was nothing which reliably suggested to the bank or its solicitors that the JD had permanently moved out of Malaysia.
>
> The evidence available to the bank and its solicitors was that the debtor had addresses both in England and in Malaysia and was frequently travelling from Malaysia to England and back to Malaysia or *vice versa*. It would seem that an advertisement in either the English or Malaysian newspaper would in all probability have been equally effective to give him notice of the proceedings as it turns out the appellant had been aware within two days of the effective date

of the SS of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support of his application which he sought to have it set aside.

**[13]** In the instant case, there is a material doubt as to whether premises No. 295-A, Jalan Kampung Tengah, Kemaman and No. A-295, Jalan Kampung Tengah, Chukai, Kemaman in fact refers to the same premises as contended by the JC. The onus is on the JC to satisfy this court or produce rebuttable evidence against the allegation of the JD that the JD's address is No. A-295, Jalan Kampung Tengah, Chukai, Kemaman and not No. 295-A, Jalan Kampung Tengah, Kemaman and that it refers to the same premises instead of a bare averment. The JC has failed to rebut this material fact to show that the posting of both the bankruptcy notice and the creditor's petition had been effected on the correct premises of the JD. Accordingly, this Court finds there is no proper and regular service on the JD as contended by the JD.

**Hearing Date Of The Creditor's Petition**

**[14]** This court finds that the advertisement in "the Star newspaper" on 28 August 1995 and the notice of hearing (encl. 13A) states that the creditor's petition will be heard on 12 September 1995 at 9am. However, there is no evidence that the JD had been informed of any adjournment or the actual date of the hearing of the creditor's petition, being 21 November 1995 when the receiving and adjudicating orders were made against her on 21 November 1995. The "afidavit penampalan" affirmed on 23 August 1995 by one En. Mohd. Roslan bin Mohamad (encl. 14A) refers to the order of court dated 19 July 1995 of the substituted service and states that the said order of court has been posted on premises No. A-295, Jalan Kampung Tengah, Kemaman, on the notice board of the Magistrate's Court, Kemaman and on the notice board of the High Court, Kuantan. This "afidavit penampalan" (encl. 14A) did not disclose that the creditor's petition, the affidavit of truth of statement in petition and the notice of hearing dated 19 July 1995 (encl. 13A) have been posted by way of substituted service as ordered by the court on 19 July 1995. In fact, the endorsement made by the deponent also did not state that he had served or posted the creditor's petition, the affidavit of truth of statement in petition or the said notice of hearing (encl. 13A).

**[15]** As the JC seems to have firmly relied on the posting itself and that the posting of the creditor's petition on the notice board of the Magistrate's Court, Kemaman and the High Court, Kuantan pursuant to the said order of court for substituted service was sufficient service, surely the JC must produce sufficient evidence that the creditor's petition has in fact been posted with the said order of court of substituted service and that the JC has complied with the terms of the said order of court. Further, by para. 4 of the "afidavit penampalan", the deponent has stated "satu salinan Saman dan Perintah Penyampaian Ganti tersebut dilampirkan sebagai Ekshibit MR". It is clear that nowhere in the "afidavit penampalan" (encl. 14A), the deponent has stated that the creditor's petition was ever posted on premises No. A-295, Jalan Kampung Tengah, Kemaman (which is disputed by the JD as the correct address) or at the notice board of the Magistrate's Court, Kemaman or at the High Court, Kuantan. This is a clear breach of the said order of court dated 19 July 1995 which expressly states that the creditor's petition and the order made therein be served on the JD by posting a copy of the same on the said premises and on the notice board of both the courts.

**[16]** Consequently, there has been non-compliance with r. 114(2) of the Rules as there is no evidential material that the CP had been served on the JD by way of substituted service in accordance with the order of court dated 19 July 1995.

Rule 114(2) of the Rules states:

> A Creditor's Petition shall not be heard until the expiration of eight days from the service thereof: provided that where the act of bankruptcy alleged is that the debtor has filed a declaration of inability to pay his debts or where it is proved to the satisfaction of the Court that the debtor has absconded or in any other case for good cause shown the Court may on such terms if any as the Court may think fit to impose hear the petition at such earlier date as the Court may deem expedient.

Rule 115 of the Rules states:

> The Registrar shall appoint time and place at which the petition will be heard and notice thereof shall be written on the petition and sealed copies and where the petition has not been served the Registrar may from time to time alter the first day so appointed and appoint another day and hour.

**[17]** Based on the affidavits filed by the JC, there is no evidence produced to the satisfaction of the court that the JD had absconded or any good cause has been shown why the bankruptcy notice and the creditor's petition were served by way of SS although there has been an order given by the learned registrar to serve the same by way of SS and why the creditor's petition was not heard on the date appointed, being 12 September 1995 as stated in the notice of hearing and in the Star newspaper. There is also no reason advanced why the creditor's petition was heard on a later date being 21 November 1995 and without any prior notice to the JD of the change of date.

**[18]** On the set of facts, in particular, taking into account the affidavit of posting, the learned registrar seemed to have exercised her discretion mechanically and not judiciously when the receiving order and adjudicating order were granted as there was no evidential material before the court that the creditor's petition was posted in accordance with the order of court dated 19 July 1995. On this ground alone, the application (encl. 21) ought to have been allowed and the receiving and adjudicating order be set aside *ex debitio justitae* for failing to comply with an essential rule being service of process. (see *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241; *Craig v. Kanssen* [1943] 1 All ER 108 at p. 113; *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd* [1988] 1 CLJ 577; [1988] 2 CLJ (Rep) 522 HC; *Muniandy Thamba Kaudan & Anor v. Development & Commercial Bank Bhd* [1996] 2 CLJ 586 FC; *Beale v. Mc Gregor* [1886] 2 TLR 311, *Atwood v. Chichester* [1978] 3 QBD 722; *Harley v. Samson* [1914] 30 TLR 450; *United Oriental Assurance Sdn. Bhd. v. Ng King See* [1986] 1 LNS 87; *Malayan Banking Bhd. v. PK Rajamani & Anor* [2004] 3 CLJ 79).

**[19]** This court finds that there are two material flaws and defects in so far as the service of the creditor's petition is concerned. First, there is no evidential material that the creditor's petition has been served by posting on the said places as ordered by the court. Secondly, there is no evidence before this court whether the JD has been informed of the actual date of hearing of the creditor's petition which was on 21 November 1995 or of any adjournment as the original date as stated in the notice of hearing as published in "the Star Newspaper" is 12 September 1995. Thirdly, whether the learned Deputy Registrar when making the receiving order and adjudication order on 21 November 1995 had considered the above matters to satisfy herself that all those requirements pertaining to the mode of

service of the creditor's petition have been complied. In addition and admittedly, the receiving order and adjudication order dated 21 November 1995 does not reflect the true position of the JD, ie, that she was not present in court as recorded in the notes of proceedings by the learned Deputy Registrar. Accordingly, the only reasonable inference which can be drawn on the set of facts in the instant case is that, the creditor's petition was not served on the JD by posting on the JD's premises, on the notice board of the Magistrate's Court, Kemaman and on the notice board of the High Court Kuantan as ordered by the court on 19 July 1995.

**[20]** Further, on going through the affidavit of non-service affirmed on 8 December 1994 by En. Mohd. Adzman bin Kasim, this court finds the deponent has not stated who had directed him to serve the bankruptcy notice on the JD and what was his capacity at the material time when he is supposed to have served the bankruptcy notice on the JD, ie, whether he was a staff of the JC or a staff of the JC's solicitors or an officer of the court or a freelance process server employed by the JC's solicitors or the JC and who had precisely directed or authorized him to serve the bankruptcy notice on the JD. Although this observation by this court may not necessarily be a decisive consideration in determining whether service was in fact effected but upon considering the totality of the set of facts in the instant case, it has by necessity became a relevant factor in determining this appeal and saman dalam kamar (encl. 21) in particular, when the service of the bankruptcy notice itself has been challenged by the JD as having not been served on him or posted on his premises. In any event, r. 109 of the Bankruptcy Rules 1969 provides that the creditor's petition shall be served by specified persons.

Rule 109 states:

> **109. Personal Service**
>
> A creditor's Petition **shall be** personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor (emphasis added).

**[21]** This court also finds that r. 110 and r. 111(1) of the Bankruptcy Rules 1969 have also not been complied by the JC.

Rule 110 states:

**110. Substituted service**

(1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause **it may order substituted service to be effected in such manner as it thinks fit** (emphasis added).

(2) Where any such **order has been carried out the petition shall be deemed to have been duly served on the debtor** (emphasis added).

Rule 111(1) states:

**111. Proof of service**

(1) **Service of the petition** shall be proved by affidavit (emphasis added).

**[22]** Accordingly, this court is of the considered view that unless the requirement as contained in r. 110 and r. 111(1) have been complied, which the JC had failed to comply, the deeming provision as in sub (2) of r. 110 cannot be activated. In the event, it is only reasonable to infer that the creditor's petition has not been posted on the places as ordered by the court on 19 July 1995. Therefore, there is non-compliance with the terms of the order of court dated 19 July 1995 to be read with r. 110(1) and (2) and r. 111(1) as to the service as there is no affidavit evidence that the petition has been posted.

> ... bankruptcy involves a change of status and carries with it quasi-penal consequences. The bankrupt becomes subject to certain disqualifications in respect of his civil rights and public offices. It follows that the courts must be vigilant to ensure that there is no compromise in respect of the meeting of procedural requirements not only on the letter of them but also in the spirit of such requirements. Per VC George J (as he then was) in *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292.

**Issue That The JD Was Not Present In Court On 21 November 1995 When The Creditor's Petition Came Up For Hearing**

**[23]** The receiving order and adjudicating order dated 21 November 1995 (exh. CCC1) attached to the affidavit of the JC (encl. 23)

states that the JD was present in court on 21 November 1995. On the other hand, the JD has produced a handwritten copy of the notes recorded by the learned Deputy Registrar which was supplied on request to the JD's solicitors upon payment, which states that the JD was not present in court when the CP was called up for hearing on 21 November 1995 when the receiving order and adjudicating order was made. (Refer to exh. P2 of "Afidavit Balasan II" (encl. 30) and exh. P4 of and "Afidavit Balasan III" of the JD (encl. 36)).

**[24]** It is interesting to note that by para. 7 of the "afidavit ketiga" of the JC (encl. 33) in reply to the "Afidavit Balasan II" of the JD (encl. 30), the JC has in fact admitted that it was the previous solicitors for the JC who had inadvertently stated in the receiving order and adjudicating order that the JD was present. In other words, the JC is saying that there is also a mistake in the receiving order and adjudicating order which has been extracted by the JC's previous solicitors. If indeed there was such a genuine mistake in the said order which the JC now claims was done by the JC's previous solicitors, is it not the duty of the JC or his solicitors to apply to the court to correct the order in order to reflect the true position of the JD on 21 November 1995 and to state that the JD was not present as has been correctly recorded in the notes of proceedings by the learned Deputy Registrar on 21 November 1995?

**[25]** This court finds that as far as the records show, there are two conflicting versions as to the JD's position on 21 November 1995. In the receiving order and adjudicating order dated 21 November 1995 which has been extracted, it is stated that the JD was present and this order was signed by the learned deputy registrar of the High Court Kuantan. Whereas the notes exh. P2 and P4 in the affidavit (encls. 30 and 36) respectively, recorded by the same learned registrar on 21 November 1995 states that the JD was not present. This court finds that the issue as to whether the JD was present or not in court on 21 November 1995 has a strong bearing to determine whether the bankruptcy notice was in fact served and posted at the correct premises of the JD and subsequently, the creditor's petition which was purported to have been posted pursuant to the order of court dated 19 July 1995 by way of substitute service.

**[26]** Be that as it may, as to the submission of learned counsel for the JC that there is no evidence to support the JD's allegation that the building known as A-295, Jalan Kampung Tengah, Chukai,

Kemaman had been demolished and even if there is no such evidence, what matters is, whether the posting of the creditor's petition pursuant to the said order of the court by way of substituted service was in fact posted on the JD's premises in order to bring the proceedings and the date of hearing of the creditor's petition to the notice of the JD. As stated above, the JC has failed to comply with the said order of court dated 19 July 1995 to be read with r. 110 and r. 111(1) of the Bankruptcy Rules 1969. This court is of the considered view that the service of documents as required by the rules in bankruptcy proceedings must be strictly complied.

**[27]** This court finds that the JC seems to be changing its evidence on the issue, whether the JD was present or not in court before the learned deputy registrar on 21 November 1995 when the creditor's petition was heard. By para. 10 of the JC's affidavit (encl. 23) the JC has alleged that the JD was attempting to lie to the court where it is stated, "JD cuba membohongi mahkamah ini dengan mendakwa kononnya tiada pengetahuan tentang prosiding ini sedangkan adalah jelas faktanya bahawa beliau telah hadir di mahkamah ini pada 21 November 1995 semasa perintah penerimaan dan perintah penghukuman tersebut direkodkan", by referring to the copy of the said receiving and adjudicating orders. By para. 11 of the said affidavit, the JC still maintains and has alleged that, "JD tidak mengetahui tentang segala prosiding kebankrapan adalah penafian kosong semata-mata sekiranya tidak mengetahui dan/atau diserahkan dokumen-dokumen tersebut kepadanya mana mungkin penghutang penghakiman boleh hadir di mahkamah pada tarikh tersebut seperti yang direkodkan di dalam fail Mahkamah yang mulia ini". By para. 12 of the affidavit (encl. 28), the JC still maintains that, "dakwaan yang telah dibuat oleh JD tersebut adalah sama sekali tidak berasas. Segala kenyataan yang dideposkan adalah berdasarkan kepada perintah yang telah direkodkan di hadapan mahkamah yang mulia ini adalah mengikut rekod JC, JD telah hadir di hari perbicaraan tersebut dan perintah mahkamah telah disahkan oleh mahkamah yang mulia ini." In other words, the JC has accused the JD as not a truthful person despite the fact that the JD had stated that she did not attend court and that the bankruptcy notice and the creditor's petition was not served on her. However, when the JD had rebutted the allegation of the JC that she was present by producing a copy of the notes of proceeding recorded by the learned deputy registrar on 21 November 1995 (exh. P2) in the "afidavit balasan" (encl. 30), the JC had changed its evidence. By

A para. 7 of the "afidavit balasan ketiga" (encl. 33), the JC has changed its evidence by stating that the deponent beliefs that, "peguamcara JC terdahulu bagi JC mungkin telah dengan tidak sengaja menyatakan dalam Perintah Penerimaan dan Perintah Penghukuman yang telah disediakan oleh peguamcara terdahulu JC
B bahawa JD hadir".

**[28]** It is important to state that the evidence on behalf of the JC is not consistent and the JC does not seem to have any positive evidence as to the true position, namely, whether the JD was
C present in court on 21 November 1995 where it has been alleged repeatedly that the JD was in fact present which is contrary to the notes of proceedings. The JC then changed their stand and as a desperate attempt has put the blame on the JC's previous solicitors who was supposed to have inadvertently stated in the receiving order
D and adjudicating order that the JD was present. This change of evidence by the JC came about after the JD was able to rebut the allegation that the JD was present in court by producing the notes of proceeding recorded by the learned deputy registrar that the JD was not present in court.

E

**Affidavit Affirmed On 7 September 1994 By En Idris bin Ismail As A Resident Officer In Charge Of The JC And The Bankruptcy Notice Dated 13 September 1994 Has Been Tampered And Blancoed To Change The Amount**

F **[29]** This court finds the complaint is also not without any basis as:

a. Paragraph 3 of the said affidavit clearly shows and is not denied by the JC that there is a blanco and the figure 703.35 has been
G inserted. The bankruptcy notice under "the amount due" and also at p. 4 under item No. 24 where the amount towards interest has been handwritten after having blancoed and the figure 703.35 in the column being the total amount has been inserted after the blanco.

H

b. The JC has not been able to show or produce any rebuttable evidence that this blanco and alteration were done before the filing of the bankruptcy notice and the affidavit in court.

c. It is important to state at this stage that the contents of the
I affidavit are accepted as evidence. Therefore, evidence cannot be altered or tampered with or even amended except that it may

in certain circumstances be corrected where there is a genuine mistake and only with the leave of the court when the court is satisfied that there was a genuine mistake.

d. In this case, both the deponent and the Commissioner for Oaths have not initialled at the figures or in the margin if the same were in fact correction and was done before the affirmation as it must be done before the deponent had affirmed the affidavit.

e. There is no rebuttal evidence to support that this alteration and blanco was done before or at the time the deponent had affirmed the affidavit in the presence of the Commissioner for Oaths and before it was filed in court.

f. In fact, there is no initial at the figure or in the margin of the affidavit by the learned deputy registrar or on the places where the figures were altered if the same was done before it was filed in court or before the learned deputy registrar signed the bankruptcy notice.

g. Therefore, the reasonable inference that can be drawn on the set of facts on this issue is that, the alteration or tampering or the blanco and insertion of the figures was done after the deponent had affirmed the affidavit and the bankruptcy notice was signed by the learned deputy registrar of the High Court, Kuantan.

Rule 39 of the Bankruptcy Rules 1969 states:

**39. Erasures, alterations, etc.**

Unless the Court otherwise orders, no affidavit shall be read or used in any proceedings if there is any interlineation, alteration, or erasure in the body of the affidavit or jurat, unless the person before whom the affidavit was sworn has initialled the interlineation or alteration, and in the case of an erasure has re-written and signed or initialled in the margin of the affidavit any words or figures written on the erasure.

**[30]** The alteration or tampering of the evidence in the affidavit and in the statutory Form of the bankruptcy notice is inadmissible and the bankruptcy notice is bad in law and defective and unless prior leave of the court had been obtained to correct the same. Accordingly, r. 41 of the Rules does not apply as the defects are not formal or a mere irregularity or trivial but is a matter of serious

concern to the court where the original figures have been blanchoed and rewritten without any initial and arguably could tantamount to tampering with evidence.

**[31]** Be that as it may, by para. 5.2(1) and 5.3(1) of the "afidavit ketiga" (encl. 33) the JC has stated that "the amendments" to the bankruptcy notice and the affidavit of En. Idris bin Ismail which was affirmed on 7 September 1994 was done by the previous solicitors of the JC before the bankruptcy notice and affidavit was filed in court. This court finds that this part of the evidence as hearsay and cannot be admitted or accepted as the truth. Although hearsay evidence to some extent may be admissible in interlocutory proceedings where the affidavit may contain statements of information or belief with the sources and grounds thereof, in the instant case, the facts deposed in para. 5.2(1) and 5.3(1) of the "afidavit ketiga" (encl. 33) are not from the personal knowledge of the deponent and did not disclose the sources and grounds of the statements of information or belief. The facts deposed are merely statements of information or belief and without any proper basis, sources and grounds of the statements of information or belief. (see *Re Application of Asia Insurance Co. Ltd v. Tan Swee Liang* [1967] 1 LNS 138; *Chong Peng Chong v. Chin Lean Fatt & Ors* [2004] 1 CLJ 22).

**[32]** The admissibility of the hearsay evidence in interlocutory proceedings is not an absolute rule and depends on the facts of each case. In this case, as stated above, the evidence in the affidavit has been altered, blancoed and inserted with figures. The person who can truly give an explanation must necessarily be the deponent of that affidavit himself or the Commissioner for Oaths or at least the previous solicitor in charge of this case but certainly it cannot be Cik Melenia, the deponent of "afidavit ketiga" (encl. 33) which was affirmed on 8 October 2007 and her evidence is hearsay and ought to be rejected.

**[33]** This court finds that the alteration and blanco are not formal defects which can be allowed to be used as evidence as r. 39 is crystal clear that the requirements that the provisions therein are mandatory as the word "shall" has been used in r. 39. Whereas r. 41 is discretionary. Rule 41 can only be invoked in the event, the court finds that there was only an irregularity which on the set of facts in the instant case is not the same.

**[34]** Be that as it may, and in all fairness to learned counsel for the JC it is only proper to state that the present solicitors took over conduct of the brief as from 4 October 2007 when the notice of change of solicitors (encl. 26) was filed in court. As a result and taking into account the chronology of the documents filed in court, learned counsel for the JC, with respect, had to encounter an uphill task to persuade this court to dismiss the appeal. The background facts as highlighted in this judgment were against and contrary to the JC's contention.

**[35]** The facts in *Re Stephen Wong Leong Kiong* [2005] 5 CLJ 504, *Re Sharma Kumari* [2005] 2 CLJ 535 and *Re Amran Ahmad, ex p MBF Finance Bhd* [2005] 7 CLJ 172 relied on by the JC can be distinguished when compared to the facts in the instant case and does not assist to support the JC's contention that the grounds raised by the JD can be remedied. Accordingly, r. 41 and r. 274 of the Rules does not apply to the set of facts and circumstances in the instant case. O. 41 of the RHC 1980 does not apply as there are specific rules for bankruptcy proceedings to regulate proceedings under the Act and Rules (see r. 276 of the Rules).

**Issue That The Deponent En Idris bin Ismail Had No Authority To Act On Behalf Of The JC To Commence The Bankruptcy Proceedings**

**[36]** This court finds that there is no rebuttable evidence to the challenge of the JD to show that the deponent has in fact the legal authority to commence the bankruptcy proceedings on behalf of the JC. There is no explanation or rebuttable evidence why the deponent is not able to produce at least a copy of the Power of Attorney if he has in fact been authorized in order to support the deponent's contention that he has the authority to commence bankruptcy proceedings on behalf of the JC despite the challenge of the JD as to the total amount due and the miscalculation of the interest (see *Re David ex p United Asian Bank Bhd* [1991] 2 CLJ 1047; [1991] 2 CLJ (Rep) 543; *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; *Datuk Mohd. Safi bin Datuk Haji Nur v. Norwith Winster Slow Insurance (M) Sdn. Bhd.* [1992] 2 MLJ 344).

In *Re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd* [2001] 8 CLJ 226, there was a copy of the resolution under seal which was produced on behalf of the JC as evidence and marked as an exhibit.

The JD took objection to the authority of the officer who signed the creditor's petition and affirmed the affidavit in support to the creditor's petition. However, in response, a copy of the resolution under seal was produced on behalf of the JC as evidence and was marked as an exhibit to show the officer had the authority. In the instant case, no such documentary evidence has been produced despite the challenge by the JD on the authority of En. Idris bin Ismail.

**The Correct Amount Of Interest Is Not Reflected In The Bankruptcy Notice And Not In Accordance With The Consent Judgment**

**[37]** As to the calculation of interest, there seems to be a miscalculation and the amount claimed is more than the amount actually due. By the bankruptcy notice issued to En. Ali @ Abdul Aziz bin Hassan, one of the guarantors in respect of the same claimed as against the JD, in Kuala Terengganu High Court, Bankruptcy No. 29-667-2000, the JC had calculated the interest as RM59,736.92 from 16 April 1988 till 15 April 1994 whereas the interest calculated and claimed in the bankruptcy notice in the instant case from 16 April 1988 till 17 April 1994 (two days difference) totals to RM84,667.08 (see paragraph exh. P3 in "afidavit balasan IV" of the JD (encl. 40)). The consent judgment recorded on 14 December 1990 and the interest calculated as per the bankruptcy notice seems not to be consistent with the terms of the consent judgment and the variation of interest seems to be carried out arbitrarily from time to time. There is factual and legal basis for this complaint which requires detail explanation and breakdown which does not seem to have come from the JC.

**[38]** As there is no explanation or rebuttable evidence to the glaring difference in the calculation of the interest, the JC is deemed to have accepted the JD's contention that there is a miscalculation in the interest and the interest claimed in the bankruptcy notice is more than the amount due. The bankruptcy notice therefore is a nullity (see *Chen Heng Ping v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690; *J. Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104).

**[39]** As to the allegation raised on behalf of the JC that Dato' Bastian had been in correspondence with the JC bank, it has been rebutted by the affidavit of Dato' Bastian (encl. 31) that he had only represented En. Abdul Aziz bin Hassan and did not represent

the JD in the bankruptcy proceedings or En. Hassan bin Abd. Rahim as En. Hassan bin Abd. Rahim had passed away in the year 1993. If Dato' Bastian did not represent the JD which is not disputed and the fact that the letters were written in respect of the bankruptcy proceedings against the JD on the basis that the third guarantor was making an attempt to settle the debt due to the JC does not necessarily make the JD aware of the bankruptcy proceedings as the solicitors were not acting for the JD and they have no legal obligation to inform the JD as to the correspondence between the JC's solicitors and the solicitors for En. Abdul Aziz bin Hassan.

## Delay

**[40]** The general rule is that, an application to set aside an order or judgment given in the absence of a party must be made promptly and within a reasonable time. However, the court still has the discretion in a proper case however long or inordinate or in particular circumstances, to disregard the lapse of time or delay if the delay has been clearly explained and justice so demands that the order or judgment obtained by default is found to be irregular as in the instant case (the receiving and adjudicating orders). In those circumstances, the rule is that, it should be set aside *ex debitio justitae*. In the instant case, this court finds that the receiving and adjudicating orders made on 21 November 1995 in the absence of the JD as above is irregular and ought to be set aside *ex debitio justitae* (see *United Oriental Assurance Sdn Bhd v. Ng King See* [1986] 1 LNS 87; *Berkenaan George Paul Daniel a/l Arokiam, ex p United Asian Bank Bhd* [1990] 2 CLJ 750; [1990] 1 CLJ (Rep) 364). Nevertheless, the period of delay has to be considered or assessed from the date the JD knew or ought to have known of the default order, (the receiving and adjudicating orders) having been made against her (see *Yew Leek Enterprise Sdn. Bhd. v. Foong Engineering & Construction Works Sdn Bhd* [1989] 1 LNS 141; *Atwood v. Chichester* [1978] 3 CBD 722; *Evans v. Bartlam* [1937] AC 473; *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241, *Haliza Suradei & Ors v. Ng Eng Lee* [2001] 1 CLJ 266). In the instant case, the JD only came to know of the receiving and adjudicating orders when she applied for loan from a financial institution to buy a vehicle when she was informed that she was not qualified to obtain a loan. The JD then appointed the solicitors to obtain the details of the bankruptcy proceedings. She then managed to obtain all the relevant documents from the insolvency department at the branch in Kuantan.

**[41]** This court is of the view that the same legal principle that a party who is seeking the indulgence of the court to set aside an order or judgment obtained by default should make a full frank and honest disclosure of all relevant facts should also apply with equal force to an adversary. In the instant case, the JC had by affidavit evidence attacked the JD as being not truthful in reply to the JD's contention that she did not attend court on 21 November 1995. Before the JC embarks on an attack against the JD as not a truthful person the JC must obtain all relevant facts and the correct facts. In the instant case, the JD has been able to produce sufficient evidence, namely, the notes recorded by the learned deputy registrar that JD was not present in court on 21 November 1995. The learned deputy registrar has recorded in her notes of proceedings that the JD was not present in court on 21 November 1995 when the receiving and adjudicating orders were granted. However, the JC in a roundabout turn, later puts the blame on the previous solicitors and that it was a mistake when it is stated in the receiving and adjudicating orders that the JD was present in court. It is therefore clear on the totality of the evidence before this court that the JC did not have in their possession all the relevant facts and the correct facts to oppose the said application (encl. 21) and consequently this appeal.

**[42]** In any event, this court like "every court in this jurisdiction must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is considered" or the demands of justice (per Terrell AG CJ in *The Motor Emporium v. Arumugam* [1933] 1 LNS 106; [1933] MLJ 276 at p. 278).

**[43]** In the event this court had erred in its findings in deciding in favour of the JD on the grounds raised on behalf of the JD, this court is of the considered view that the receiving and adjudicating orders cannot still be sustained as first, there is no evidence that the creditor's petition had been served by way of substituted service in accordance with the order of court dated 19 July 1995. Secondly, there is no evidence that the JD had been informed of any adjournment of the hearing of the CP or the change of date or the new date being 21 November 1995 as shown in the Star newspaper and as stated in the notice of hearing as 12 September 1995. Thirdly, the JC's reliance on the date of hearing as contained in the advertisement of the Star newspaper as being sufficient notice to the

JD of the date of hearing of the creditor's petition is in conflict with the date when the receiving and adjudicating orders were granted, being 21 November 1995.

**[44]** In the circumstances, this court is of the considered view when taking into account the cumulative effect of the defects and in particular, the non-service of the creditor's petition in accordance with the order of court, it is not fair and equitable that the debtor should have been adjudged a bankrupt. This court is satisfied that the JD has advanced sufficient reasons in support of the application (encl. 21) to annul the adjudicating order made on 21 November 1995 and to rescind the receiving order of the same date under the first limb of s. 105(1) and (5) of the Act respectively (see *Re Amos William Dawe; Amos William Dawe v. Wayfoong Mortgage And Finance (Singapore) Ltd* [1978] 1 LNS 167; *Peh Kong Wan, Re* [1992] 3 CLJ 1747; [1992] 3 CLJ (Rep) 195; *Kwong Yik Bank Bhd v. Hah Chiew Yin* [1985] 2 CLJ 31; [1985] CLJ (Rep) 177; *Dato' Haji Mohd Muslim bin Othman v. Shuaib bin Lazim & Anor* [1993] 2 CLJ 177; *Re A Debtor (No.446 of 1918)* [1920] 1 KB 461 at p. 465; *Re A Debtor (No. 12 of 1970) ex p Official Receiver v. The Debtor* [1971] 1 All ER 504; *Re Davidson* [1894] WN 210; *Re Carr* [1886] 35 WR 150; *Re A Debtor (No. 994, 1935), ex p the Debtor v. Official Receiver* [1936] 1 All ER 794; *Re Shuaib bin Lazim, ex p Merchantile Insurance Sdn. Bhd.* [1992] 4 CLJ 2066; [1992] 3 CLJ (Rep) 580).

**[45]** The cumulative merits of the various arguments and grounds raised by learned counsel for the JD is not without any basis as to the flaws and defects as found by this court which requires serious consideration in view of the fact that bankruptcy laws are to be strictly interpreted and complied. As far as this court is concerned, the paramount consideration in the instant case is to ensure that justice is done and parties comply strictly with the procedural requirements of the bankruptcy laws, ie, the Bankruptcy Act 1967, the Bankruptcy Rules 1969 and the binding authority of precedent (see *Re Stephen Wong Leong Keong, ex p HSBC Bank (M) Bhd* [2005] 5 CLJ 504; *Bungsar Hill Holdings Sdn. Bhd. v. Dr. Amir Farid Datuk Isahak* [2005] 2 CLJ 809). This court finds that substantial injustice has been caused by the several defects and flaws which are serious and the injustice cannot be remedied by invoking s. 131 of the Act or r. 274 of the Rules.

**[46]** There has been procedural impropriety and unfairness to the JD. It is the function of this court in this rehearing to put the records right and in accordance with the demands of justice. This

A is the essence of judicial duty. A litigant who has lost his or her case will not believe he or she has been fairly treated if his or her adversary is able to obtain an order or judgment against him or her by default without having served the cause papers as required by law and in this case, in accordance with the order of court made on
B 19 July 1995. Justice must not only be done but must manifestly be seen to be done. Therefore, this observation necessarily must mean the court must exercise its discretion judicially and not in reference to any mechanical formula, otherwise it will defeat the whole purpose of a litigant seeking a judicial decision in cases filed
C in court (see *Re Yong Tet On Paul, ex p Chong Khiaw Bank Ltd* [1996] 1 CLJ 836; *Re Peter Wong, ex p The Debtor* [1958] 1 LNS 66). Had the learned Deputy Registrar taken into consideration that the creditor's petition was not served as per the affidavit of posting, there is a possibility that on the set of facts, she may not have
D granted the receiving and adjudicating orders. This court cannot permit such travesty of justice to stand unrectified when it is brought to the attention of this court.

**[47]** In the circumstances and in accordance with the rules of
E reason and justice, this court finds that this is a suitable case for this court to interfere with the order made by the learned deputy registrar on 21 November 1995 where the application of the JD was dismissed. On the set of facts, this court is satisfied that the receiving and adjudicating orders made on 21 November 1995 ought
F not to have been made having regard to the facts and circumstances of this case. Accordingly, the appeal by the JD is allowed and order in terms of the summons in chambers (encl. 21) is granted to the JD, namely, prayers (1) and (2). The adjudicating order is annulled and the receiving order is rescinded. The JD is allowed costs of this
G appeal.

H

I